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The Saviour of Chinese traditional cultural expressions? Analysis of the Draft Regulations on Copyright Protection of Folk Literary and Artistic Works

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In September 2014, Regulations on Copyright Protection of Folk Literary and Artistic Works, drafted by the National Copyright Administration of the People's Republic of China, opened to the public for comments. This marks the beginning of the countdown for the adoption of intellectual property legislation for traditional cultural expressions (TCEs) in China. This paper briefly introduces the legislative history in relation to TCEs at an international level and in China, and then discusses the highlights of the Draft Regulations. More importantly, the paper evaluates the practicability of Draft Regulations from the perspective of a balance of interests and private rights, the terms used and relevant definitions, the identity of the special authority and the boundaries of rights to TCEs. Then the paper provides comments on improvement of the Draft Regulations, based on China's situation and referencing international/regional/other national legislative experiences.

Keywords: intellectual property, traditional cultural expressions, China, law

1 INTRODUCTION

The issue of the protection of traditional cultural expressions (TCEs),¹ especially intellectual property (IP) protection of TCEs, has attracted a lot of attention at both a national and international level in recent decades. The United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) are the main international organizations which promote international legal protection of TCEs. UNESCO has developed several international conventions in relation to the protection of cultural resources.² In 1982, UNESCO and WIPO developed the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action (1982

1. The term 'folk literary and artistic works' used in the Regulations on Copyright Protection of Folk Literary and Artistic Works is equivalent to the term 'traditional cultural expressions' (TCEs). The term 'folk literary and artistic works' is used only in quoting relevant articles of the Regulations, whereas the term 'TCEs' is normally used by the author in the paper. The accuracy of the term 'folk literary and artistic works' is discussed later in the paper.

2. Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity (2001) UNESCO <http://www.unesco.org/bpi/intangible_heritage/> accessed 15 September 2014; Convention for the Safeguarding of Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006); Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007).

Model Provisions), which protected TCEs from an IP perspective. The serious misappropriation of TCEs in recent years has accelerated the disappearance of these cultural resources, leading to communities who hold these resources seeking more rights to self-determination of their culture at international level.³ Many developing countries are also trying to improve IP protection progress due to the economic value of TCEs.⁴ Since 2000, the intergovernmental committee on intellectual property, genetic resources, traditional knowledge and folklore (IGC), organized by WIPO, has discussed the issue on protection of TCEs through IP instruments.⁵ There is a preliminary agreement on constructing a special IP-type system, which is called a *sui generis* system, to protect TCEs through Draft Articles on Protection of Traditional Cultural Expressions (hereafter WIPO Draft Articles) developed by WIPO-IGC. However, many issues remain on how to use this special IP-type instrument to protect TCEs.

Like most developing countries with abundant traditional cultural resources, China has announced a series of legal instruments to protect its TCEs. In 2004 China began its task of preserving and safeguarding its cultural heritages (CHs) through a number of regulations.⁶ In 2010 China announced its intangible cultural heritages (ICHs) law,

3. World Intellectual Property Organization, 'Intellectual Property Needs and Expectations of Traditional Knowledge: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998–1999)' (2001) 69–205.

4. Folk arts and crafts have increased by 12–15% yearly in China in recent years. The annual output value is over CNY10 billion, approximately GBP1 billion. The folk arts and crafts industry in India is an important part of the Indian economy; the output of this industry in India achieved a value of USD6.1 billion between 2000 and 2001. Indian arts and crafts in New Mexico are an 800 million dollar annual industry. Zhongtuo guwen wenhua hangye yanjiu zhokan 21–27 August 2011 (Cultural Industry Research Weekly between 21–27 August 2011 by China Investment Consulting) (2011) 11; M Liebl and T Roy, 'Handmade in India: Traditional Craft Skill in a Changing World', in M Finger and P Schuler (eds), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries*. (The World Bank and Oxford University Press, USA 2004) 53–73; A Lucas-Schloetter, 'Folklore' in S von Lewinski (ed), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (Kluwer, Netherlands 2004) 259–60.

5. In July 2014 WIPO-IGC organized its twenty-eighth session.

6. Opinions on Strengthening the Work for the Administration on the Protection of World Cultural Heritage of China 2004, Law Info China <<https://vpn.ruc.edu.cn/DanaInfo=en.pkulaw.cn+display.aspx?cgid=51977&lib=law>> accessed 15 October 2014; Guanyu shishi zhongguo minzu minjian wenhua baohu gongcheng de tongzhi (Notice on the Implementation of the Protection of the Project of Chinese National Folk Culture) 2004, The Intangible Cultural Heritage in China <[http://www.ihchina.cn/show/feiyiweb/html/com.tjopen.define.pojo.feiyiweb.faguiwenjian.FaGuiWenJian.detail.html?id=a7433181-5125-45ae-a7d8-67ef2eaf4843&classPath=com.tjopen.define.pojo.feiyiweb.faguiwenjian.FaGuiWenJian](http://www.ihchina.cn/show/feiyiweb/html/com.tjopen.define.pojo.feiyiweb.faguiwenjian.detail.html?id=a7433181-5125-45ae-a7d8-67ef2eaf4843&classPath=com.tjopen.define.pojo.feiyiweb.faguiwenjian.FaGuiWenJian)> accessed 15 October 2014; Notice of the State Council on Strengthening the Protection of Cultural Heritage 2005, Law Info China <<https://vpn.ruc.edu.cn/DanaInfo=en.pkulaw.cn+display.aspx?cgid=72935&lib=law>> accessed 15 October 2014; Opinions of the General Office of the State Council on Strengthening the Protection of Intangible Cultural Heritage of Our Country 2005, Law Info China <<https://vpn.ruc.edu.cn/DanaInfo=en.pkulaw.cn+display.aspx?cgid=58149&lib=law>> accessed 15 October 2014; Administrative Measures for the Protection of World Culture Heritages 2006, Law Info China <<https://vpn.ruc.edu.cn/DanaInfo=en.pkulaw.cn+display.aspx?cgid=81523&lib=law>> accessed 15 October 2014; Interim Measures for the Protection and Administration of National Intangible Cultural Heritage 2006, Law Info China <<https://vpn.ruc.edu.cn/DanaInfo=en.pkulaw.cn+display.aspx?cgid=89433&lib=law>> accessed 15 October 2014. Guojia feiwuzhi wenhua yichan baohu zhuanxiang zijin guanli zhanxing banfa (Provisional Measures on Management of Special Funds for National Intangible Cultural Heritage) 2006, The Intangible

which is regarded as a remarkable improvement in the protection of its TCEs.⁷ However, these legal instruments are in the public law sector, which regulates governments' role in the protection of TCEs. At the same time, while the tourism economy and globalization brings about a blooming industry for TCEs, it can also cause their disappearance. In this regard it can be noted that a large number of TCEs are exploited and commercialized while local community members obtain little economic return; TCEs become an instrument only for earning money whereas the culture, knowledge and skills behind them are abandoned; misappropriation and distortion frequently occur, and fakes and imitations are flooding the market. It is obvious that the above legal instruments cannot resolve the IP issues in the commercialization of TCEs. China announced its copyright law for the first time in 1990, in which article 6 refers to the copyright protection of expressions of folklore (EoF).⁸ Article 6 regulates that '[r]egulations for the protection of copyright in expressions of folklore shall be separately established by the State Council'.⁹ This article remains in the 2001 version of China's copyright law with no change and in the 2010 version with minor changes in its English translations.¹⁰ It is shame that the State Council still did not establish any separate rules about the protection of TCEs after the revision of China's copyright law in 2010. Therefore, Article 6 provides protection to TCEs only in principle, rather than providing practical, detailed protection mechanism.

Cultural Heritage in China <<http://www.ihchina.cn/show/feiyiweb/html/com.tjopen.define.pojo.feiyiwangzhan.FaGuiWenJian.detail.html?id=64dc0bc3-b63d-494a-9afa-6680e4e0fdf3&classPath=com.tjopen.define.pojo.feiyiweb.faguiwenjian.FaGuiWenJian>> accessed 15 October 2014; Guanyu jiaqiang laozihao feiwuzhi wenhua yichan baohu gongzuo de tongzhi (Notice on Improving the Protection of Intangible Cultural Heritage of Time-honoured Brands) 2007, The Intangible Cultural Heritage in China <<http://www.ihchina.cn/show/feiyiweb/html/com.tjopen.define.pojo.feiyiwangzhan.FaGuiWenJian.detail.html?id=3fa59e06-74f3-4aef-8903-637e146eb583&classPath=com.tjopen.define.pojo.feiyiweb.faguiwenjian.FaGuiWenJian>> accessed 15 October 2014; Zhongguo feiwuzhi wenhua yichan biao shi guan li ban fa (Management Measures on Chinese Intangible Cultural Heritage Indication) 2007, The Intangible Cultural Heritage in China <<http://www.ihchina.cn/show/feiyiweb/html/com.tjopen.define.pojo.feiyiwangzhan.FaGuiWenJian.detail.html?id=14810494-3266-4595-aaf7-dc9c15e883fe&classPath=com.tjopen.define.pojo.feiyiweb.faguiwenjian.FaGuiWenJian>> accessed 15 October 2014; Guojiaji feiwuzhi wenhua yichan xiangmu daibiaoxing chuanchengren rending yu guan li zhanxing ban fa (Provisional Measures on the Accreditation and the Management of Representative Inheritors of National Intangible Cultural Heritage Items) 2008, The Intangible Cultural Heritage in China <<http://www.ihchina.cn/show/feiyiweb/html/com.tjopen.define.pojo.feiyiwangzhan.FaGuiWenJian.detail.html?id=54a87e58-4b40-4776-9e78-4aa7dadf9eee&classPath=com.tjopen.define.pojo.feiyiweb.faguiwenjian.FaGuiWenJian>> accessed 25 December 2013.

7. Intangible Cultural Heritage Law of the People's Republic of China 2011, WIPO <<http://www.wipo.int/wipolex/en/details.jsp?id=8939>> accessed 15 September 2014.

8. Copyright Law of People's Republic of China 1990, State Intellectual Property Office of the P.R.C. <http://english.sipo.gov.cn/laws/relatedlaws/200804/t20080416_380362.html> accessed 22 September 2014.

9. Copyright Law of People's Republic of China 1990, art 6.

10. In the Copyright Law of 2010 version, article 6 in the English version states that measures for the protection of copyright in works of folk literature and art shall be formulated separately by the State Council.

In 2014, protection of TCEs through IP legislations became involved in the Chinese State Council's legislative work plan.¹¹ On 2 September 2014, *minjian wenxue yishu zuopin zhuzuoquan bao hu tiaoli* (Regulations on Copyright Protection of Folk Literary and Artistic Works)¹² (hereafter Draft Regulations), drafted by the National Copyright Administration of the People's Republic of China, were opened to the public for comments.¹³ This marks the beginning of the countdown for the adoption of IP legislation for TCEs in China.

2 MILESTONE IN IP PROTECTION OF TCEs IN CHINA

The most remarkable improvement in the Draft Regulations, compared with the previous laws in China, is that the Draft Regulations provide a specific and systematic protection for TCEs from a perspective of private rights.

2.1 Special protection for TCEs

In 1997, China announced a specific rule in relation to parts of TCEs, which was the Regulations on Protection of Traditional Arts and Crafts¹⁴ (Regulations for TACs). As an initial step in the protection of TCEs, the role of the Regulations for TACs was positive because they started to consider the aspects of inheritance, protection and development for the first time.¹⁵ However, the Regulations for TACs had a limited role in the protection of TCEs, as the subject matter in the Regulations only involved parts of TCEs.

Since 2004, Chinese laws have mainly targeted CHs or ICHs as a whole, rather than provide specific rules in relation to TCEs. CHs embrace tangible cultural heritages and ICHs. Traditional knowledge (TK) and TCEs are both involved in ICHs.¹⁶ From the

11. Guowuyuan bangongting guanyu yinfa guowuyuan 2014 nian lifa gongzuo jihua de tongzhi (Circular of General Office of the State Council on Issuing a Legislative Work Plan of the State Council in 2014) 2014, No.7, Yunnansheng zhengfu fazhi xinxi wang (Yunnan Government Legal System) <<http://www.zffz.yn.gov.cn/ynsfzxxw/1946680938930896896/20140327/255675.html>> assessed 16 September 2014.

12. In this paper, all Chinese authors' names are presented by following the Western style. Chinese Romanization of the pinyin system is used for Chinese concepts and translations. Many Chinese texts and some Chinese regulations related to TCEs, such as the Draft Regulations, are translated by the author. Original Chinese version: <<http://www.ncac.gov.cn/china/copyright/contents/483/225066.html>> assessed 16 September 2014.

13. National Copyright Administration of the People's Republic of China, 'Circular of the National Copyright Administration on Seeking Comments on the Regulations on the Copyright Protection of Folk Literary and Artistic Works (Draft for Comments)' National Copyright Administration of the People's Republic of China <<http://www.ncac.gov.cn/chinacopyright/contents/483/225066.html>> assessed 15 September 2014.

14. Regulations on Protection of Traditional Arts and Crafts 1997, WIPO <<http://www.wipo.int/wipolex/en/details.jsp?id=7788>> accessed 16 September 2014.

15. Ibid.

16. ICHs refer to 'the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history,

perspective of public law, it is not necessary to establish a specific law for TCEs. For example, Chinese public laws in relation to ICHs mainly regulate governments' responsibilities and roles in the preservation of ICH resources, such as the establishment of an inventory system of ICHs, financial support for ICH inheritance activities and encouraging the public to protect ICHs. TCEs and other ICHs are both involved in this preservation work organized by governments. There is no difference between the preservation work of TCEs and that of other ICHs, from a governmental point of view, as they both have huge cultural value, embodying and connecting with a community's identity and culture, and disappearing. However, from a perspective of private rights, especially from an IP perspective, it is necessary to set up separate protection systems for different ICHs. For example, TK '[refers to]/[includes]/[means], for the purposes of this instrument, know-how, skills, innovations, practices, teachings and learnings of [indigenous [peoples] and [local communities]]/[or a state or states]'.¹⁷ TCEs refer to:

any form of [artistic and literary], [creative and other spiritual] expression, tangible or intangible, or a combination thereof, such as actions, materials, music and sound, verbal and writ- ten [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms].¹⁸

Although both TK and TCEs are involved in ICHs, it is obvious that they may refer to different IP rights, based on the understanding of their definitions. In fact, the discussion in WIPO-IGC mentions that TK is most suitable for patent protection, whereas copyright law better protects TCEs. The objective of the Draft Regulations in China is to protect the copyright of folk literary and artistic works, guarantee the reasonable use of these works, and encourage inheritance and development of folk literature and arts.¹⁹ This illustrates that the Draft Regulations provide a special copyright protection for TCEs as a whole, which is in line with international norms. More importantly, specific protection of TCEs, from a perspective of private rights, targets TCEs' misappropriation issues more directly than those of public legal protection.

2.2 Comprehensive protection for private rights

The Draft Regulations construct a comprehensive copyright protection system to protect TCEs and the relevant private rights. Firstly, the Draft Regulations protect both Chinese TCEs and foreign TCEs in that they state '[t]he Regulations apply to Chinese folk literary and artistic works'.²⁰ Meanwhile, '[t]he copyright in foreign folk literary and artistic works under an agreement concluded between China and the country to which they belong, or under an international treaty to which both countries are parties, shall be protected by the Regulations'.²¹

and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity', Convention for the Safeguarding of the Intangible Cultural Heritage, art 2.1.

17. WIPO, 'The Protection of Traditional Knowledge: Draft Articles' (2014) WIPO/GRTKF/IC/28/5, anx, 5.

18. WIPO, 'The Protection of Traditional Cultural Expressions: Draft Articles' (2014) WIPO/GRTKF/IC/28/6, anx, 5.

19. Draft Regulations, art 1.

20. Ibid art 3.

21. Ibid.

Secondly, the Draft Regulations mention beneficiaries in relation to TCEs and their relevant rights for the first time by stating that specific nations, ethnic groups or communities who are copyright holders of folk literary and artistic works,²² 'shall be entitled to: acknowledgment; prevention of distortion or misrepresentation of these works; use these works by way of reproduction, distribution, performances, adaptations and disseminations etc.'²³ Moreover, these copyrights shall not be allowed to be transferred,²⁴ to set up pledge rights, to be enforceable subject matters²⁵ or to be contained within a certain time limit.²⁶

Moreover, the Draft Regulations mention relevant beneficiaries that are respectively adaptors, recorders, performers, people who dictate folk literary and artistic works and other users. 'Use of folk literary and artistic works need authorisation from, and the payment of a reasonable remuneration to ... the copyright holders themselves ...'.²⁷ Users who are outside of specific nations, ethnic groups or communities need authorization from both adaptors and copyright holders of TCEs and pay a reasonable fee for both adaptors and copyright holders when using works adapted from TCEs.²⁸ If the use of adapted work from TCEs is in accordance with the regulations on statutory licence under current copyright law, above users should only pay a reasonable remuneration, rather than obtain authorization from copyright holders of TCEs.²⁹ Besides, article 12 of the Draft Regulations defines a recorder as 'a person who collects and records folk literary and artistic works'.³⁰ Article 12 also states that '[r]ecorders have responsibilities to acknowledge the identities of people who perform or dictate folk literary and artistic works when collecting and recording, and recorders shall negotiate with them about remuneration'.³¹ Further, 'Use of folk literary and artistic works collected and recorded by recorders shall acknowledge the identities of recorders, performers and people who make dictation'.³² The above rules in the Draft Regulations clarify relevant beneficiaries' rights and liabilities, which guarantees that TCEs can be reasonably used.

Thirdly, the Draft Regulations have a special authority to manage the copyright of folk literary and artistic works. Article 8 mentions:

Use of folk literary and artistic works need authorisation from, and the payment of a reasonable remuneration to, either the copyright holders themselves or a special authority appointed by the administrative department for copyright, under the State Council.³³

Users shall 'describe how they plan to use the folk literary and artistic works, such as the name of works, amount, usage range and terms of use etc. [w]here applying for authorisation from the special authority'.³⁴ The special authority shall 'not refuse

22. Ibid art 5.

23. Ibid art 6.

24. Ibid art 13.

25. Ibid.

26. Ibid art 7.

27. Ibid art 8.

28. Ibid art 10.

29. Ibid.

30. Ibid art 12.

31. Ibid.

32. Ibid.

33. Ibid art 8.

34. Ibid.

authorisation unless special reasons exist'.³⁵ However, both copyright holders and the special authority cannot grant users an exclusive right to use,³⁶ which actually aims at promoting the use of TCEs in a wider range. The special authority 'shall promptly announce to the public the information on folk literary and artistic works on record',³⁷ shall make a decision on the proportion of remuneration that the users will pay,³⁸ shall have responsibilities to 'promptly distribute to relevant nations, ethnic groups or communities the collected remuneration referring to folk literary and artistic works ... establish a database and announce to the public the information, on collection of, and distribution to, remuneration of folk literary and artistic works'.³⁹ Besides,

For copyright holders of folk literary and artistic works that cannot be confirmed within five years of the date of collection of remuneration, the remuneration will be used in encouraging transmission and inheritance, promotion and development of Chinese folk literary and artistic works, after five years.⁴⁰

The establishment of the special authority can allow those TCEs which cannot confirm that a certain nation, ethnic group or community is the copyright holder to be very well protected and avoid misappropriation use. In many cases, even though users may have a willingness to obtain authorization from copyright holders and share remuneration among copyright holders, they might not know who the TCE's copyright holder is. A regular publication of information on TCEs, made by the special authority, allows users to identify the copyright holders so as to obtain authorization and pay remuneration more effectively. Moreover, in some cases, even if users know that the copyright of certain kinds of TCEs belong to a certain community, they do not know who can represent this community to collect the remuneration. Direct payment to the special authority can save users' time in finding the correct representative, which actually promotes the utilization rate of TCEs. Even if it is not possible for the special authority to confirm the copyright holders later on, it still guarantees that remunerations will be used for the development and promotion of TCEs. Moreover, current laws do not have rules in relation to the above situation, which may result in some users' accelerated abuse of TCEs, without the threat of any legal liabilities. The existence of a special authority could remedy this gap whereby TCEs are used inappropriately, or used without payment by users citing an excuse of unknown copyright holders or no relevant law. The Draft Regulations also provide some limitations and exceptions for the rights of TCEs. Firstly, a member of 'a specific nation, ethnic group or community may use folk literary and artistic works without fulfilling the process, mentioned in the first paragraph, where traditional or customary use is for the purposes of cultural transmission and inheritance'.⁴¹ This is to respect their customary use or the traditional use of these works, which is also in accordance with the WIPO Draft Articles on exceptions of customary use and traditional use. Moreover, article 14 of the Draft Regulations states that the exception only applies to the use of 'the folk literary and artistic works being made

35. Ibid.

36. Ibid.

37. Ibid art 9.

38. Ibid art 8.

39. Ibid art 11.

40. Ibid.

41. Ibid art 8.

open to the public'.⁴² Therefore, it is still illegal to use TCEs that are not yet open to the public. This article allows fair use⁴³ as well as regulating conditions for fair use such as acknowledgment of beneficiaries, no disparaging copyright holder, no conflicting with a normal exploitation of folk literary and artistic works, and no damaging copyright holder's legal rights.⁴⁴ The conditions guarantee that the fair use shall not damage copyright holders' legal benefits.

In addition, the Draft Regulations set detailed rules on violation of the Regulations, including relevant civil, administrative and criminal liabilities,⁴⁵ exemptions⁴⁶ and interaction articles with existing laws.⁴⁷

2.3 Community rights vs private rights

For a long time, there has been a fierce debate on the protection of TCEs by using IP instruments. Many people argue that IP law is recognized as a law focusing on protecting private property rights. Beneficiaries under IP law are individuals who contribute their intellectual labour. However, TCEs, being transmitted in a community, are held by the whole community rather than by its individual members. In other words, all community members have communal rights in TCEs. Therefore, some people are struggling to use a private right law to protect communal rights. They misunderstand that this kind of communal right illustrates that TCEs are in the public domain because all community members can freely use it. In fact, when looking at the issue of communal rights and private rights from the perspective of IP protection of TCEs, it can be seen that a hybrid and changeable identity is shown in the rights to TCEs.

Understanding the nature of rights to TCEs as a communal right from the correct perspective is the first task. It is important to recognize that the right to TCEs is a type of private right within the context of the current legal dichotomy between public and private. There is no doubt that community members can freely use their TCEs, but this does not mean that TCEs are in the public domain. This communal right is based on all community members holding, inheriting, using and developing folklore from generation to generation. For these members in this community, folklore is open to the 'public' but the scope of the word 'public' remains within this community. Every member of this community holds, shares and uses folklore for free. From this perspective, the rights to TCEs are a communal right to everyone inside the community but also a private right held by the community as a whole against non-community members. In fact, this legal dichotomy philosophy can be shown in the Draft Regulations. In article 8, it mentions that 'use of [TCEs] need[s] authorisation from and pay [ing] reasonable remuneration to ... copyright holders...' ⁴⁸ but '[a] member of a specific nation, ethnic group or community can use folk literary and artistic works without fulfilling [this] process ... where traditional or customary use is for the purposes of cultural transmission and inheritance' ⁴⁹.

42. Ibid art 14.

43. Ibid.

44. Ibid.

45. Ibid art 15 and art 17.

46. Ibid art 16.

47. Ibid art 19 and art 20.

48. Ibid art 8.

49. Ibid.

Moreover, even for the individual community members, their rights and liabilities are in a changeable status. The communal right is a private right of the community as whole rather than a private right to individual members. Therefore, although individuals who are members of the community are entitled to the communal right, it must be noted that individual members' use of the communal rights should be in accordance with the community's communal interest rather than the individual member's interest. Therefore, when individual members use this right over the communal interest of the community as a whole, their rights and liabilities are changed. In the past, community had its powerful customary law to restrict individual members' acts to an acceptable area. The content of customary law expresses the community's communal interest. After all, the individual's interest is not always in line with the community's communal interest. However, the modern legal system does not legally recognize customary law, which weakens the power of customary law. It is embarrassing that customary law becomes moral rules, rather than a law which is legally binding. Therefore, if an individual member utilizes the identity of a community member to abuse community right to TCEs, and thus betrays customary law (by betraying the community's communal interest), this individual member would not be punished by laws recognized in the modern legal system but may only be condemned by other members. For instance, if an individual member changes a traditional pattern just to gain popular acceptance so as to sell products, it may be an inappropriate use of TCEs, but customary law can do nothing.

However, the Draft Regulations may fill this gap. Article 8 states that community members' community right, which gives them the right to freely use TCEs, is limited to a narrow area of traditional use or customary use for the purposes of cultural transmission and inheritance. In other words, once a community member uses TCEs outside the above purpose, the advantage of the right to free use disappears because his/her use does not benefit/satisfy the needs and communal interest of the community as a whole (which is cultural transmission and inheritance). Under article 8, the above use of TCEs is a modern commercial act, rather than a customary or traditional use for the purposes of cultural transmission and inheritance. In this case, this individual member's act should be regarded as equivalent to an outsider's act. That is to say, this community member should obtain authorization and pay reasonable remuneration to his community in accordance with paragraph 1 of article 8.

3 THE SAVIOUR OF TCEs?

Although the Draft Regulations seem to design a comprehensive structure for the protection of TCEs, many aspects in the Regulations are not clear.

3.1 Confusing terms on the subject matter

The title of the Draft Regulations is 'Regulations on Copyright Protection of Folk Literary and Artistic Works'. In the Draft Regulations, the protected subject matter is 'folk literary and artistic works'. However, the title itself and the terms used to define the subject matter are not accurate and would result in confusion.

The Draft Regulations use the word 'work' in its title and protective subject matter, which could result in confusion. There is an agreement at international level that the reason for the establishment of special regulations is because TCEs are different from general copyright works. TCEs refer to 'any form of [artistic and literary], [creative and other

spiritual] expression, tangible or intangible, or a combination thereof’,⁵⁰ that ‘[is created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities [or nations]’.⁵¹ From a traditional IP perspective, TCEs do not achieve the threshold of a copyright work.⁵² TCEs are already in the public domain as they have a historical context, thus the copyright protection term (which has a limited period) would have already expired. Meanwhile, TCEs are mainly regarded as those referring to activities of inheritance rather than creativity. Moreover, the authors’ identity is unknown as TCEs are created, developed and used by certain communities rather than by individuals. From an operational point of view, the establishment of separate regulations at both international and national level illustrates that TCEs are different from general copyright works. Therefore, the legislation will need to distinguish TCEs from general copyright works when considering IP instrument to protect TCEs.

The Draft Regulations use the term ‘folk literary and artistic works’. According to article 2 of the Draft Regulations, folk literary and artistic works refer to:

literary and artistic expressions, with traditional value and cultural value, created and generated, in a collective context, by [a] non-specific member of [a] specific nation, ethnic group or community, which include[s] but [is] not limited [to] the following types: works that [are] expressed by verbal or written form such as folk stories, legends, poetries, ballads and proverbs; works that [are] expressed by music form[s] such as folk songs and instruments; works that [are] expressed by forms of actions, positions and countenances such as folk dances, drama and Quyi; works that [are] expressed by plane or three-dimensional form such as folk paintings, patterns, sculptures and architectures.⁵³

Obviously, the term ‘folk literary and artistic works’ in the Draft Regulations is equivalent to the term ‘TCEs’. Nevertheless, use of the word ‘work’ in the term ‘folk literary and artistic works’ may result in confusion in that folk literary and artistic works connect with general copyright work, under copyright law. The fact is that there are many copyrighted works that are derived from TCEs. These works are normally derived from TCEs, created by individuals who are inside or outside of certain communities and embrace the individuals’ own creative intellectual labour.⁵⁴ Therefore, copyright law can protect these works. The term ‘folk literary and artistic works’ involved in the Draft Regulations definitely does not refer to the above works derived from TCEs but TCEs themselves. At a regional and international level, many model laws also intend not using the word ‘work’, so as to distinguish TCEs from works defined in copyright law such as the above. The term ‘TCEs’ is used in the WIPO Draft Articles. In the 1982 Model Provisions developed by both WIPO and UNESCO, the term ‘expressions of folklore’ (EoF) was used rather than ‘works of folklore’. At regional level, the Model Law for the Protection

50. WIPO/GRTKF/IC/28/6, annex, 5.

51. Ibid.

52. A copyright work satisfies criteria including originality, fixation (common law countries) and the normally known identity of the individual author. All copyrighted works can only be protected for a limited period.

53. Draft Regulations, art 2.

54. *Milpurrru v Indofurn Ltd* (1994) 130 ALR 659; *Xiu-e Bai v State Post Bureau* (2001), Law Info China <<http://epr oxy.l ib.tsi nghua.edu.cn/rewr iter /CHI NALAWINFO/ htt p/ uho9bghm-k-vhmen9bnl/case/displaycontent.asp?Gid=117458923&Keyword=%B0%D7%D0%E3%B6%F0>> accessed 24 December 2013; *Fu-yuan Hong v Lin-hai Qing* (2008), Law Info China <<http://eproxy.lib.tsinghua.edu.cn/rewriter/CHINALAWINFO/http/ uho9bghm-k-vhmen9bnl/case/displaycontent.asp?Gid=117611188&Keyword=%BA%E9%B8%A3%D4%B6>> accessed 24 December 2013. See also Luo Li, *Intellectual Property Protection of Traditional Cultural Expressions – Folklore in China* (Springer, Switzerland 2014) 38–41.

of Traditional Knowledge and Expressions of Culture, developed by the Secretariat of the Pacific Community in 2002, uses the term ‘traditional knowledge and expressions of culture’.⁵⁵ Hence, use of the word ‘work’ in the term ‘folk literary and artistic works’ is misleading and should be removed. Furthermore, removal of the word ‘work’ would also be in line with international norms.

It is assumed that the Draft Regulations use the term ‘folk literary and artistic works’ because the Draft Regulations need to be in accordance with article 6 of the Copyright Law of 2010. In the English version, this article indicates that ‘[m]easures for the protection of copyright in works of folk literature and art shall be formulated separately by the State Council’.⁵⁶ However, it is not accurate for both the terms ‘works of folk literature and art’ and ‘folk literary and artistic works’ to be used when referring to TCEs. Besides the issue on the word ‘work’, neither the words ‘folk literary and artistic’ nor ‘folk literature and art’ cover all TCEs. The English version of the Copyright Law of 2010 changed the term ‘EoF’ used in the Copyright Law of 1990 and 2001 to the term ‘folk literature and art works’. The term ‘folk literature and art works’ is actually the literal translation of the Chinese term ‘minjian wenxue yishu’.⁵⁷ Nevertheless, even without the word ‘work’, the term ‘folk literary and artistic’ in the Draft Regulations or ‘folk literature and art’ in 2010 version do not embrace some TCEs such as folk festivals, rituals, sports and ceremonies. When looking at this issue from an international perspective, although WIPO-IGC uses the term ‘TCEs’ as a neutral working term in the IGC documents due to the term ‘EoF’ being regarded as having negative connotations of the word ‘folklore’ by some communities, the WIPO documents state that ‘[t]he acronyms “EoF” and “TCEs” refer to both expressions of folklore and traditional cultural expressions’.⁵⁸ Therefore, the terms ‘EoF’ or ‘TCEs’ are more accurate and more in line with the international norms than the term ‘folk literary and artistic works’.

3.2 Unclear definition of beneficiaries

The Draft Regulations state that the beneficiaries of TCEs are non-specific members of a specific ‘minzu’ (nation), ‘zuqun’ (ethnic group) or ‘shequn’ (community) and copy- right of TCEs belong to this specific nation, ethnic group or community.⁵⁹ Here, the terms ‘nation’, ‘ethnic group’ and ‘community’ are not accurate as they may overlap in their range and not be distinguished very clearly. However, the Draft Regulations do not contain further explanations about these terms. In article 2 of the WIPO Draft Articles, beneficiaries are ‘indigenous peoples and local communities [and/or nations] and nations’.⁶⁰ China does not have a colonial history, therefore there is no concept of indigenous peoples in a Chinese context. In China’s long history, there are many occasions of mass migrations and mixtures of races and ethnicities for the purpose of politics.

55. Model Law for the Protection of Traditional Knowledge and Expressions of Culture 2002, WIPO <http://www.wipo.int/wipolex/en/text.jsp?file_id=184651> accessed 22 September 2014.

56. Copyright Law of 2010, art 6.

57. In the Chinese pinyin system, ‘minjian’ means folk, ‘wenxue’ means literary and ‘yishu’ means art.

58. WIPO ‘Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options’ (2003) WIPO/GRTKF/IC/6/3, 9.

59. Draft Regulations, art 2 and art 5.

60. WIPO Draft Articles, art 2.

Thus, sometimes it is not possible to define a specific ethnic group or nation as the custodian of certain kinds of TCEs. Furthermore, a certain family may be the custodian of a certain kind of TCE, however the definition of beneficiaries in the Draft Regulations does not cover families. In fact, the term ‘community’ could be regarded as a broader concept than that of an ethnic group or nation. ‘Community means a group of people who have lived together in a society for a long time and have stable cultural customs, based on natural elements and social conditions, such as a certain ethnicity, regions, faith, cultural features, historical reasons and living customs.’⁶¹ Moreover, ‘[c]ommunity does not simply reveal itself as a particular location, that is, a projection of community onto a physical, proprietary place, but marks its territory and its history through the refrains in its cultural production and resources’.⁶² Therefore, the term ‘community’ is both a collective feature and a unique cultural identity which distinguishes it from others. In this case, the term ‘community’ has a more flexible definition, which may cover many beneficiaries. The term ‘community’ may include: an indigenous or local community, which refers to ‘a tightly knit social unit, whose members experience feelings of unity and solidarity and have traditionally lived in a specific region’.⁶³ ‘The Convention on Biological Diversity uses the term “indigenous and local communities” in recognition of communities that have a long association with the lands and waters that they have traditionally live on or used’,⁶⁴ and ‘an ethnic group or cultural community’, which refers to ‘a tightly knit social unit whose members experience strong feelings of unity and solidarity and which is distinguished from other communities by its own culture or cultural design, or by a variant of the generic culture’.⁶⁵ To some extent, a family can be regarded as a small community in which members live together and experience feelings of unity and solidarity. A family refers to ‘a group of persons connected by blood, affinity, or law, especially within two or three generations’.⁶⁶ Hence, use of the term ‘community’ is more accurate and comprehensive. The Draft Regulations could use the term ‘community’ and provide a detailed explanation about the term ‘community’ based on the above discussion. The Draft Regulations define TCEs as ‘...with traditional value and cultural value, created and generated, in a collective context, by [a] non-specific member of [a] specific nation, ethnic group or community’.⁶⁷ ‘Rights of TCEs belong to [a] specific nation, ethnic group or community’.⁶⁸ In practice, however, because of the mixed residence of multiple ethnicities and various migrations in Chinese history, there exists the situation whereby certain kinds of TCEs may originate from place A, then mainly pass to place B and/or finally be famous in place C. In this case, is it reasonable to identify communities in all places as beneficiaries or only identify one or some communities in three places as beneficiaries? However, the Draft Regulations do not clarify this issue.

61. Zhang Geng, *Minjian wenxue yishu de zhishi chanquan baohu yanjiu* (Research on Intellectual Property Protection of Folklore) (Law Press China, Beijing 2007) 200.

62. Johanna Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Ashgate, Farnham, UK 2005) 69.

63. UNESCO, ‘Draft Glossary Proposed by a Group of Dutch Experts Convened by the Bureau of the Netherlands National Commission for UNESCO’ (2002) TER/CH/2002/WD/4.

64. WIPO, ‘Glossary of Key Terms Related to Intellectual Property and Traditional Cultural Expressions’ (2011) WIPO/GRTKF/IC/18/INF/7.

65. TER/CH/2002/WD/4 (2002).

66. Bryan A Garner et al., *Black’s Law Dictionary* (8th edn Thomson West, St Paul 2004) 637.

67. Draft Regulations, art 2.

68. Ibid art 5.

3.3 What is the identity of the special authority?

There are many TCEs that may be not confined, or attributable, to a specific community, which is a common situation in the world. Therefore, article 2.3 of the WIPO Draft Articles states that:

[Where the [subject matter]/[traditional cultural expressions] [is not claimed by specific indigenous [peoples] or local communities despite reasonable efforts by the Member State to identify them,] [Member States]/[Contracting Parties] may designate a national authority as custodian of/for the [benefits]/ [beneficiaries] [of protection under this instrument] where the [subject matter]/[traditional cultural expressions] [traditional cultural expressions meeting the eligibility criteria in this [instrument]] as defined in this [instrument]: (a) is expressed within a community [whose] in a territory [is] that is entirely and exclusively coterminous with the territory of that [Member State]/[Contracting Party]; (b) [is not confined to a specific indigenous [people] or local community; or (c) is not attributable to a specific indigenous [people] or local community.]⁶⁹

The Draft Regulations do not limit a national authority to being designated as a custodian for beneficiaries in certain circumstances when TCEs are not confined or attributable to a specific community. Articles 8, 9, 11 and 15 of the Draft Regulations all mention a ‘zhuanmen jigou’ (special authority). Article 8 mentions that the special authority is designated by the National Copyright Administration of the State Council.⁷⁰ It also regulates that use of TCEs shall obtain authorization from and pay a reasonable remuneration to either the copyright holder or a special authority.⁷¹ The special authority shall not refuse to authorize others using TCEs unless some special reasons exist.⁷² The remuneration collected by the special authority shall be used for the encouragement of TCEs’ inheritance, promotion and development where it is not possible to identify the copyright holder within five years.⁷³ Furthermore, the special authority can bring parties to arbitration or to the court in its name where disputes on use of TCEs occur.⁷⁴ All of above regulations illustrate that the special authority has a similar feature to that of a national authority regulated by the WIPO Draft Articles, in that it can represent those beneficiaries of TCEs that are not confined or attributable to a specific community, to administer their copyrights.⁷⁵

However, article 15 regulates that both copyright holders and the special authority can bring parties to arbitration or to the court. The special authority shall give notice to the representative of copyright holder when bringing the matter to arbitration or to the court in its own name where disputes on use of TCEs occur.⁷⁶ It seems that the special authority can represent not only beneficiaries of TCEs that are not confined or attributable to

69. WIPO Draft Articles, art 2.3.

70. Draft Regulations, art 8.

71. Ibid.

72. Ibid.

73. Ibid art 11.

74. Ibid art 15.

75. WIPO Draft Articles, art 2.3 and art 4.1: [Member States]/[Contracting Parties] [may]/ [shall] [establish]/[appoint] a competent authority or authorities, [with the prior informed consent or approval and involvement of] [in consultation with] [traditional cultural expressions [holders]/[owners]], in accordance with their national law [and without prejudice to the right of traditional cultural expression [holders]/[owners] to administer their [rights]/[interests] according to their customary protocols, understandings, laws and practices.

76. Draft Regulations, art 15.

a specific community but also beneficiaries of TCEs that can be confined or attributable to a specific community. The special authority only has the responsibility to give notice to the representative of the copyright holders of the TCEs before it brings the matter to arbitration or to the court in its own name.

Moreover, article 8 states that users of TCEs shall obtain authorization from and pay a reasonable remuneration to either copyright holders or the special authority.⁷⁷ Without further explanation, this article seems to provide a choice to users based on their willingness: users can obtain authorization from and pay remuneration to either the copyright holder or the special authority. In this article, copyright holders and the special authority stand in the same status, or, rather, the special authority has a supplementary status in the situation that TCEs are not confined or attributable to a specific community. However, a more reasonable way seems to be that users require authorization from copyright holders where TCEs are confined or attributable to copyright holders, whereas authorization is required from the special authority where TCEs cannot be confined to custodians. After all, communities are the real copyright holders of TCEs.

Furthermore, article 16 regarding exemptions states that '[w]hen a copyright holder undertakes litigation, users shall be not liable for damages where their use of folk literary and artistic works obtains authorisation from the special authority and pay reasonable remuneration in accordance with Article 8'.⁷⁸ This even granted the special authority a higher level of status than the copyright holders of TCEs. All the above articles give the special authority the hybrid role of a custodian of TCEs, an administrator and a supervisory authority, which results in the main identity of the special authority being unclear. Therefore, it is necessary to clarify who it is that the special authority represents. The purpose behind the establishment of the special authority is mainly to guarantee that the law can protect those TCEs that are not confined or attributable to a specific community, and avoid the issue of not having beneficiaries to fight the infringement. It is more notable that the rights of TCEs are IP-type rights, which belong to private rights based on details of rights regulated in most laws at national, regional and international level. Although many international legislations, regional legislations and national laws mention competent authority/ national authority/traditional authority, all laws admit that eventually right holders of TCEs are the communities who hold, use, develop and preserve TCEs.⁷⁹ The competent authority/national authority/traditional authority should only manage relevant rights to TCEs in certain circumstances. National authorities in the WIPO Draft Articles can be designated as custodians to assist in managing the rights of TCEs, at the request or authorization of the beneficiaries, or if the TCEs are not confined or attributable to a specific community.⁸⁰ In Panama laws, general congresses or traditional authorities represent the relevant indigenous communities and are thus the holders of their rights.⁸¹ Therefore, general congresses or traditional authorities representing communities can exercise relevant rights. The 1982 Model Provisions, however,

77. Ibid art 8.

78. Ibid art 16.

79. 1982 Model Provisions; Tunis Model Law on Copyright for Developing Countries 1976; Bangui Agreement Relating to the Creation of an African Intellectual Property Organization, Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property, opened for signature 2 March 1977 (entered into force 8 February 1982); Special System for the Collective Intellectual Property Rights of Indigenous Peoples Act 20 2000; Ministry of Trade and Industries Executive Decree No. 12 2001; Model Law for the Protection of Traditional Knowledge and Expressions of Culture 2002.

80. WIPO Draft Articles, art 4.1 (alternative 1).

81. Directives, art 5.

provide both a competent authority and a supervisory authority at the same time. In its commentary, it suggests that: a competent authority could be the Ministry of Culture or Arts, any public institution for matters related to TCEs, authors' society or similar institution;⁸² a representative body of the community could be designated as a competent authority;⁸³ and the supervisory authority is normally an administrator such as Ministry of Culture.⁸⁴ Furthermore, a distinctive feature of the 1982 Model Provisions, compared with the later model laws at both international and regional level, is that the 1982 Model Provisions prefer to designate a competent authority to represent communities rather than recognise the community's power to exercise its rights on its own because the supervisory authority cannot appropriately supervise how the community exercises its rights.⁸⁵ To some extent, the 1982 Model Provisions actually deprive the community of its rights in terms of the self-determination of its culture. Furthermore, it is uncertain that the relevant institutions, such as an authors' society or the Ministry of Culture or Arts, mentioned in the 1982 Model Provisions, could really represent the community as these institutions' members are normally not community members. If this is the case, it is unsuitable for non-community members to represent or exercise rights originally belonging to the community. In fact, it is more reasonable that authorities should provide a solution in cases in which a community does not have the capacity to exercise rights (so as to designate a representative body) or for beneficiaries of TCEs which are not confined or attributable to a specific community. By doing this it would allow for a way of controlling and expanding rights in relation to TCEs. However, the Draft Regulations neither regard the special authority as a remedy for those TCEs which are not confined or attributable to copyright holders (the same is true of the WIPO Draft Articles) nor only allow an authority to represent a community to exercise the relevant rights (as also in the 1982 Model Provisions). The Draft Regulations are ambiguous, and, according to articles 8, 15 and 16, allow copy- right holders of TCEs to exercise their own rights, as well as allowing the special authority the same or even more powerful rights than copyright holders themselves. Obviously, where the special authority in the Draft Regulations can represent all beneficiaries of TCEs, copyright holders' rights may be actually deprived because users may prefer to obtain authorization from the special authority rather than from copyright holders themselves. The reason is: the special authority can represent all beneficiaries of TCEs. Moreover, it is suggested that the copyright holder record folk literary and artistic works at the special authority, while the special authority is responsible for establishing a database and regularly opening information to the public on TCEs recorded with the special authority. In this case, it is more convenient and saves more time for users to check a database and get authorization from the special authority, especially if they expect to use several TCEs.

Additionally, the Draft Regulations state that the special authority shall not refuse to authorize use to users unless special reasons exist,⁸⁶ which has a taste of compulsory responsibility for the special authority on authorization. However, the Draft Regulations do not have this kind of rule for copyright holders of TCEs. In other words, users' applications for the use of TCEs are potentially accepted in common situations, whereas there is uncertainty over obtaining authorization from copyright holders. Furthermore, article 16 regulates that users are exempted from their liabilities where they obtain authorization

82. 1982 Model Provisions, sec 9.

83. Ibid commentary 76.

84. Ibid.

85. Ibid.

86. Draft Regulations, art 8.

from, and pay a reasonable remuneration to, the special authority before the use of TCEs (in accordance with article 8), even if copyright holders bring a lawsuit against the users' acts.⁸⁷ Article 16 legally ignores the copyright holders' claim on others' use of their TCEs. In this case, users would definitely choose to apply for authorization from the special authority, which is the easiest and lowest risk method from an economic perspective. Copyright holders' rights to TCEs therefore become little more than an illusion, and as such, the Draft Regulations fail to provide private rights for copyright holders to control their TCEs.

Moreover, if the rights of TCEs refer to private rights, right holders should have rights to choose to bring a lawsuit or not. However, article 15 states that the special authority has rights to bring parties to arbitration or to the court in its name and shall give notice to representatives of copyright holders. This definitely illustrates that the special authority can bring the matter to arbitration or to the court even if a representative designated by the copyright holders does not want to do so. In this case, the special authority seems to be changed to a supervisory authority that supervises copyright holders' actions in the exercising of their rights. If the special authority believes that copyright holders do not exercise their rights well, it can exercise relevant rights in its own name. Moreover, article 16 on exemptions may result in the fact that copyright holders cannot manage their rights based on their own wills. If article 16 is to prevent copyright holders from abusing their rights and impede cultural transmission and development, it is more reasonable to set up relevant rules in exemptions and limitations rather than set up so confused a rule here. To some extent, the special authority's action in article 15 and article 16 intervenes in the copyright holders' rights to TCEs. The function of the special authority is a hybrid mixture of the collective management of TCEs under the Draft Regulations (it could manage all TCEs whether they are confined/attributionable to a specific community or not) and the supervision of copyright holders exercising their rights to TCEs. However, the problem is that the special authority's action may be without justification if a copyright holder (certain community) of TCEs, manages its own rights and does not authorize the special authority to do so. Therefore, the Draft Regulations may be revised later to clarify the following points based on the rights of TCEs being private rights (belonging to a community who is the real copyright holder), and that rather than directly managing the copyright holder's rights, the special authority should: (1) only bring disputes to arbitration or to the court in its name when requested to do so by the copyright holders or in cases where TCEs are not confined or attributionable to a specific community; (2) not manage the rights of TCEs where there is a confined or attributionable community, unless requested to do so by the community; (3) when copyright holders record their TCEs with the special authority, only play the role of publicizing this information and guiding users to identify and make contact with the correct community or representative body.

3.4 What are the boundaries of rights of TCEs?

The Draft Regulations provide rights to TCEs for copyright holders, which are respectively acknowledging the sources, prohibition of distortion or mutilation, and use of TCEs including reproduction, distribution, performance, adaptation, communication to the public, etc.,⁸⁸ and the right to remuneration.⁸⁹ However, because some articles in the Draft Regulations are defined either too broadly or too narrowly or too unclearly, it may result in difficulty of operation in practice.

87. Ibid art 16.

88. Ibid art 6.

89. Ibid art 8.

3.4.1 Distortion and mutilation

Article 6(2) mentions the right to prohibit distortion or mutilation of TCEs. However, defining either ‘distortion’ or ‘mutilation’ is difficult. The main characteristic of TCEs is that they are orally passed on from generation to generation; they are not fixed but change all the time throughout the course of their long history. On the one hand, certain kinds of TCEs may have originated from place A, and then be passed to place B and finally be famous in the world in place C. TCEs’ content may be changed when passing through different places due to different local cultures, environments and other elements. On the other hand, even if a certain kind of TCE is passed on only in the place in which it originated, the TCE’s content would still change due to different people’s input in the inheritance process. For example, an individual member of a certain community may create a new pattern based on a traditional pattern from his or her community or a popular pattern designed or used by outsiders in a period of Chinese history, other members may learn from him or her and finally this new pattern may gradually become part of the community’s TCEs. Obviously, no one would identify that this creation of a new pattern in the past is an action of distortion or mutilation of TCEs. No one would think that people in place C distort or mutilate TCEs in place A. With this in mind, why and how should we identify that someone’s creation of new forms of TCEs at present is an action of distortion or mutilation?

This leads to a further question of whether or not identification of one person’s action as a distortion or mutilation of TCEs is to see this person is a member of community? Outsiders may move to, and live together with, local communities in the same area for historical reasons. They normally bring their own values and technology as well as culture to the local area. This will change the local residents’ lifestyles and culture, which makes outsiders ‘guilty’ of distortion or mutilation of local TCEs. However, to some extent, the development process of TCEs is a process of cultural harmonization which is not only passed from the custodian’s own culture but also absorbs elements from outside their culture. In this case, it is not scientific to decide that one person’s use is distortion or mutilation of TCEs based on his or her non-membership of the community.

Based on the above discussion, it appears that it is very difficult to distinguish in practice between the distortion or mutilation of TCEs, from their very nature as dynamic, and it is therefore best determined on a case-by-case basis.

3.4.2 Secret and sacred TCEs

Unlike the WIPO Draft Articles, the Draft Regulations do not divide TCEs into several categories based on availability to the public. Article 14 of the Draft Regulations states:

In the following circumstances, use of folk literary and artistic works being made open to the public [is allowed] without authorisation from a copyright owner and payment of remuneration, but [the user] must acknowledge, not disparage [the] copyright owner, not conflict with a normal exploitation of folk literary and artistic works, and not damage [the] copyright owner’s legal rights...⁹⁰

90. Ibid, art 14.

Here the phrase ‘gongkai’ (being made open to the public) is not clear. The first question is what the definition of ‘being made open to the public’ is. The WIPO Draft Articles explain that ‘[Publicly available means [subject matter]/[traditional knowledge] that has lost its distinctive association with any indigenous community and that as such has become generic or stock knowledge, notwithstanding that its historic origin may be known to the public.]’⁹¹ The phrase ‘publicly available’ embraces both ‘widely known’ and ‘non-widely known’. The relevant rights are difference due to the different availability to the public. Therefore, it is necessary to determine whether or not the phrase ‘being made open to the public’ in the Draft Regulations is equivalent to the phrase ‘widely known’ or ‘non-widely known’ used in the WIPO Draft Articles, as this may impact the rights of TCEs. Secondly, if some sacred or secret TCEs are made open to the public for certain reasons, such as being opened to the public by someone intentionally, do these fall into the area of ‘being made open to the public’ so that anyone can make use of them without authorization and payment? Unfortunately, the Draft Regulations do not explain the above issues, which may result in some conflict in the use of TCEs.

To this end, experience from the WIPO Draft Articles may be referenced. The WIPO Draft Articles separate TCEs into three different ranks, namely: secret or sacred TCEs and TCEs only known to the community; TCEs that are publicly available but not widely known, sacred or secret; and TCEs that are widely known and in the public domain.⁹² The WIPO Draft Articles design different rights based on these different ranks of TCEs.⁹³ Use of sacred/secret/have only been known in the community TCEs is strictly controlled and requires authorization from TCEs’ copyright holders, whereas use of TCEs that are in the public domain or widely known, is more flexible (users only need to attribute use to beneficiaries and respect their culture and moral rights).⁹⁴ Moreover, even if there are exceptions and limitations for the use of TCEs, these shall not apply to sacred/secret TCEs and TCEs that are only known in the community.⁹⁵ Further to this, the WIPO Draft Articles also require ‘Member States to not establish exceptions and limitations when there is reasonable apprehension of irreparable harm related to [secret] and [sacred] traditional cultural expressions’.⁹⁶

Therefore, according to the WIPO’s experiences, it is of considerable importance to clarify the phrase ‘gongkai’ (being made open to the public) in article 14 and set up different rights in article 6 based on TCEs’ different availability to the public. It is particularly important for those secret and sacred TCEs to be protected through a separate article so as to guarantee their secrecy or only be available in a very small group based on the relevant community’s tradition.

3.4.3 Adaptations

There is also an issue with regards to the authorization of adaptation. Article 10 of the Draft Regulations states that anyone from outside of a particular nation, ethnic group or community who uses works adapted from TCEs, needs to obtain authorization from both the adaptor and copyright holder of the TCE/special authority and pay a reasonable

91. WIPO/GRTKF/IC/28/6, 5.

92. WIPO Draft Articles, art 3.1–3.3.

93. Ibid.

94. Ibid.

95. Ibid art 5.3.

96. Ibid art 5.2.

remuneration.⁹⁷ Use of works adapted from TCEs does not require authorization where the use satisfies the conditions of a statutory licence.

There are four situations for the use of works adapted from TCEs. The first situation is when community members create adaptations based on TCEs and other members of the community use these adaptations. In this case, if other members' use belongs to traditional use or customary use, they do not need authorization from the community according to article 8. The second situation is when community members create adapted works based on TCEs and others from outside of the community use them. In this case, outsiders need to obtain authorization from both the adaptor and community who holds the copyright of TCEs, according to article 10. The third situation occurs when outsiders create adapted works based on TCEs and other outsiders use their works. In this case, the other outsiders need to obtain authorization from both the adaptor and community who hold the copyright of TCEs according to article 10.

But it seems that article 10 misses the fourth situation that occurs when outsiders create adaptations based on TCEs and community members use outsiders' adaptations. Although it is reasonable to think that the community is the main body to provide TCE resources for adaptations in most circumstances, there is the possibility that community members absorb elements from outsiders' adaptations in their creation, and actually these adaptations are amalgamated into TCEs' culture. In fact, the development of TCEs connects with modern culture at different stages in Chinese history. In the past, for example, a pattern may have been created by someone who is outside of the community. This pattern then may become popular at that time. Some community members may use some elements of these patterns and create new patterns from these popular patterns so that these patterns are absorbed into, and become part of, TCEs' culture after decades. At present, it is still common that community members use outsiders' works; some even refer to copyright infringement of outsider's works.⁹⁸ However, article 19 of the Draft Regulations states that the copyright law shall apply for all unregulated aspects in the Draft Regulations.⁹⁹ In the case of the fourth situation, mentioned above, it should be understood that community members need to obtain authorization from the outsiders who created the adaptations (according to copyright law) but do not need to obtain authorization from the community that holds the copyrights of the TCEs (according to article 8 on traditional use in the Draft Regulations). A better description of article 8 may reduce the confusion that those who are members of the community do not need authorization from adaptors when they use adaptations, which is: users of works adapted from TCEs need to obtain authorization from the adaptor. Users shall also obtain authorization from the copyright holders of TCEs/the special authority and pay a reasonable remuneration if they are from outside of a particular nation, ethnic group or community.

Another issue about adaptations in the Draft Regulations is the unclear classification of adaptations. Article 5.3 of WIPO Draft Articles divides adaptations of TCEs into three categories, namely work that is inspired by, based on or borrowed from TCEs.¹⁰⁰ From the phrases 'inspired by', 'based on' and 'borrowed from', it can be understood that there are differences in the extent to which TCEs are used in the creation of adaptations.

97. Draft Regulations, art 10.

98. Mao Dun and Zhang Mei, 'Suzhou cixiu chanye banquan baohu yanjiu (Research on Copyright Protection of Suzhou Embroidery Industry)' (2011) China Copyright 56, 58.

99. Draft Regulations, art 19.

100. WIPO Draft Regulations, art 5.3.

While Lucas-Schloetter proposes that there is no need to distinguish between a work derived from folklore and a work inspired by folklore,¹⁰¹ the extent to which TCEs are used may influence authors' rights. When TCEs are regarded as those in the public domain and are not protected by copyright law, there is no difference among works 'inspired by', 'based on' or 'borrowed from' TCEs, as all these works are regarded as original and protected by copyright, rather than being deemed adaptations. Nevertheless, where IP law protects TCEs, it actually makes works that are 'inspired by', 'based on' or 'borrowed from' TCEs into adaptations because the law requires that the use of TCEs, including creation, warrants authorization from and payment to copyright holders of TCEs. In this case, relevant copyrights between original works and adaptations are different. Works 'borrowed from' TCEs may be viewed as most similar to TCEs themselves. Works 'based on' TCEs may incorporate more creative labour from the author, but the main body of the works is closely related to key parts of TCEs. The above two types of works normally reference key TCEs parts, which mostly connect with the cultural identity of a certain kind of community. Therefore, it is reasonable that other people's use of these forms of adaptation require authorization from TCEs holders and the payment of a reasonable fee to them. Works 'inspired by' TCEs, however, may only give people a 'folklore feeling', but the design does not belong to any community's TCEs. The author, in this case, has merely obtained some inspiration from TCEs and then creates the works. It is, therefore, more reasonable in the case of works 'inspired by' TCEs from them to be viewed as original works rather than adaptations and for these works to fall under the copyright protection by current copyright law. The purpose of the protection of TCEs is to prevent misappropriation of TCEs and encourage their communication and development, rather than to only provide some people with a right to exclusive control of TCEs' resources. If works 'inspired' by TCEs need authorization and payment, it obviously betrays the purpose of the legislation. However, the Draft Regulations do not distinguish between the types of adapted works.

3.4.4 Exceptions and limitations for use of TCEs

Article 8 of the Draft Regulations provides a narrow range for community members' use of TCEs without authorization. Article 8 mentions that members of specific nations, ethnic groups and communities do not need to obtain authorization where the use of their TCEs is for traditional or customary use for the purpose of cultural transmission and inheritance.¹⁰² However, the words 'for the purpose of cultural transmission and inheritance' may miss a situation: community members sell their TCEs' products such as some handicrafts to other residents in local areas, as their livelihood. However, this kind of customary use is not for the purpose of passing on but a kind of commercial act to some extent. In this case, the words 'for the purpose of passing on' may actually exclude this situation. However, it is understandable that the legislators design the rule like this. As many places where community members live in are developed as tourism locations, some community members' selling act becomes a purely modern commercial act rather a commercial act in the context of customary use. Therefore, what the Draft Regulations should do is to distinguish a commercial act in the context of customary use from a pure modern commercial act, rather than to refuse all commercial acts.

101. Lucas-Schloetter (n 4).

102. Draft Regulations, art 8.

Furthermore, article 14 of the Draft Regulations provides exceptions and limitations for the use of TCEs. Creation of an original work, which is one type of use of TCEs, is, however, not covered in these exceptions and limitations. This means use of TCEs for the creation of an original work needs authorization. The development of TCEs not only depends on the contribution of the community members but it is also impacted by the outside world. If we look at the history of any TCEs, it can be seen that TCEs are influenced by the politics, culture and economics in every specific stage of the history. That is the result of communication between TCEs and external culture being from outside of the community. Although the key parts of TCEs would not change, TCEs always maintain a richer development due to absorbing external culture. Therefore, a reasonable copyright protection system should be a system that achieves win-win for the three parties, namely TCEs copyright holders, the users and the public. The rule that asks for authorization for the creation of works would be an obstacle for TCEs' communication and development. It is more reasonable to allow the use of TCEs for the creation of works without authorization but with payment and respecting the TCEs' culture and the copyright holders' moral rights. However, the exceptions and limitations shall not apply to secret and sacred TCEs. In other words, the use of secret and sacred TCEs for creation still requires authorization. In this respect, the WIPO Draft Articles may be used as a reference.

4 CONCLUSION

The Draft Regulations document forms a landmark for China's legal system in that copyright protection of TCEs is now on the agenda and in process. In effect, the Draft Regulations construct a framework for how TCEs are defined and who their beneficiaries are, as well as how beneficiaries manage their rights to TCEs, relationships among TCEs' users to relevant rights and the liabilities of these users, and exceptions and limitations of rights and liabilities due to infringements of TCEs. However, the Draft Regulations have some unclear aspects in the design of these articles. In particular, the Draft Regulations need to reconsider all the aspects regarding the execution of rights to TCEs so as to establish clearer boundaries for rights and liabilities for TCEs holders, other users and the public. Moreover, clarifying the special authority in the Draft Regulations is critical. As highlighted in the discussion above, the special authority should be given jurisdiction only under certain circumstances, otherwise a situation may arise where the copyright holder's rights are relegated in favour of those held by the special authorities. The legislators who design the Draft Regulations need to consider the issues discussed in this paper and find a suitable approach to balance the benefits among different parties. The saviour role of the Draft Regulations should be to guarantee the inheritance, communication and development of TCEs and prevent misappropriation, rather than only focusing on saving the communities' benefits.

APPENDIX

Draft Regulations on Copyright Protection of Folk Literary and Artistic Works

(English translation by the author)

Article 1 (Objective)

This Regulation is enacted, in accordance with article 6 of the Copyright Law of the People's Republic of China, for the purpose of protecting copyright of folk literary and artistic works, guaranteeing the reasonable use of these works and encouraging inheritance and development of folk literature and arts.

Article 2 (Definition)

Folk Literary and Artistic Works in this Regulation refer to literary and artistic expressions, with traditional value and cultural value, created and generated, in a collective context, by non-specific members of specific nations, ethnic groups or communities, which include but are not limited to the following types:

- 1) works that are expressed in verbal or written form, such as folk stories, legends, poetries, ballads and proverbs;
- 2) works that are expressed in music form, such as folk songs and instruments;
- 3) works that are expressed in forms of actions, positions and facial expressions such as folk dances, drama, opera and Quyi;
- 4) works that are expressed in one-dimensional or three-dimensional form such as folk paintings, patterns, sculptures and architectures.

Article 3 (Applied scope)

The Regulations apply to Chinese folk literary and artistic works.

The copyright in foreign folk literary and artistic works under an agreement concluded between China and the country to which they belong, or under an international treaty to which both countries are parties, shall be protected by the Regulations.

Article 4 (Administration)

The administrative department for copyright under the State Council shall be responsible for the national copyright protection of folk literary and artistic works. Other relevant departments under the State Council shall be responsible for work in their respective areas.

Article 5 (Ownership)

Rights of folk literary and artistic works belong to specific nations, ethnic groups or communities.

Article 6 (Content of rights)

The copyright holder of folk literary and artistic works shall be entitled to:

- 1) acknowledgment;
- 2) prevention of distortion or misrepresentation of these works;
- 3) use of these works by way of reproduction, distribution, performances, adaptations and disseminations, etc.

Article 7 (Protection term)

There is no time limit for the protection term of folk literary and artistic works.

Article 8 (Authorization)

Use of folk literary and artistic works needs authorization from, and the payment of a reasonable remuneration to, either the copyright holders themselves or a special authority appointed by the administrative department for copyright, under the State Council.

Where applying for authorization from the special authority, users shall describe how they plan to use the folk literary and artistic works, such as the name of works, amount, usage range and terms of use, etc. The special authority shall not refuse authorization unless special reasons exist. Remuneration paid by the user is based on a calculation of the percentage turnover of the folk literary and artistic works. The specific proportion is determined by the special authority in accordance with the actual situation.

Neither copyright holders of folk literary and artistic works nor the special authority can authorize any user an exclusive right to use.

A member of a specific nation, ethnic group or community may use folk literary and artistic works without fulfilling the process, mentioned in the first paragraph, where traditional or customary use is for the purposes of cultural transmission and inheritance.

Article 9 (Record-filling and announcement)

The copyright holder can record folk literary and artistic works at the special authority regulated in article 8. The copyright instrument of recorded folk literary and artistic works is prima facie evidence to prove the truth of recorded matters. The special authority shall promptly announce to the public the information on folk literary and artistic works on record.

Non-recording of a folk literary and artistic work shall not impact its copyright. The measures referring to record-filling of folk literary and artistic works shall be regulated by the administrative department for copyright under the State Council; fees for record-filling shall be regulated by the administrative department for copyright under the State Council together with the competent department in charge of prices under the State Council.

Article 10 (Authorization of adaptation)

Where adaptation based on folk literary and artistic works is used by users outside of a specific nation, ethnic group or community, apart from obtaining authorization from the adapter, users shall obtain authorization in accordance with paragraph 1 of Article 8 in the Regulation and pay remuneration.

The above user can use an adaptation based on folk literary and artistic works without authorization regulated in paragraph 1 of article 8 where its use is in accordance with regulations on statutory licences in the Copyright Law of the People's Republic of China, but the user shall pay remuneration to the copyright holder in accordance with an appropriate proportion of statutory licence remuneration.

Article 11 (Benefit distribution)

The special authority appointed by the administrative department for copyright under the State Council shall promptly distribute to relevant nations, ethnic groups or communities the collected remuneration referring to folk literary and artistic works.

For copyright holders of folk literary and artistic works that cannot be confirmed within five years of the date of collection of remuneration, the remuneration will be used in encouraging transmission and inheritance, promotion and development of Chinese folk literary and artistic works, after five years.

The special authority shall establish a database and announce to the public the information, on collection of, and distribution to, remuneration of folk literary and artistic works.

Article 12 (People who take dictation, performers and recorders)

A recorder is a person who collects and records folk literary and artistic works. Recorders have a responsibility to acknowledge the identities of people who perform or dictate folk literary and artistic works when collecting and recording, and recorders shall negotiate with them about remuneration.

Use of folk literary and artistic works collected and recorded by recorders shall acknowledge the identities of recorders, performers and people who take dictation of orally transmitted folklore.

Article 13 (Transfer of rights and encumbrances)

Copyright of folk literary and artistic works shall not be transferred, set pledge rights or be the subject matter of enforcement.

Article 14 (Limitations and exceptions)

In the following circumstances, use of folk literary and artistic works being made open to the public, is allowed without authorization from a copyright holder and payment of remuneration but must acknowledge, not disparage the copyright holder, not conflict with a normal exploitation of folk literary and artistic works, and not damage the copyright holder's legal rights:

- 1) use for the purposes of the user's own personal study or research;
- 2) use for the purposes of education or research;

- 3) use for reporting events or introducing or commenting;
- 4) use in libraries, archives, memorial halls, museums or arts galleries for the purpose of recording or preservation;
- 5) use by an organ of State for the purpose of fulfilling its official duties; and
- 6) other uses under the regulation by other laws.

Article 15 (Civil liabilities)

Anyone who commits copyright infringement of folk literary and artistic works shall bear civil liabilities such as ceasing the infringement, eliminating the bad effects of the act, making an apology or paying compensation for damage.

Where use of folk literary and artistic works refers to disputes, a representative on behalf of the copyright holder can institute arbitration or litigation; the special authority appointed by the administrative department for copyright under the State Council can take the matter to arbitration or litigation in its own name and inform the representative of the copyright holder promptly.

Article 16 (Exemptions)

When a copyright holder undertakes litigation, users shall be not liable for damages where their use of folk literary and artistic works obtains authorization from the special authority and they pay reasonable remuneration in accordance with Article 8.

Article 17 (Administrative liabilities and criminal liabilities)

Anyone who commits copyright infringement of folk literary and artistic works, as well as impairing public interests at the same time, may be ordered by the administrative department for copyright under the State Council to discontinue the infringement, be warned, and have his unlawful gains confiscated; the copies produced through infringement may also be confiscated or destroyed. Fines can be imposed in the range from 1 to 5 times the business turnover where the illegal business turnover is more than RMB 50 000; if there is no illegal business turnover, illegal business turnover is difficult to calculate or illegal business turnover is less than RMB 50 000, a fine of up to RMB 250 000 can be imposed; where the circumstances are serious, the said department may, in addition, confiscate the material, tools and instruments mainly used to produce copies through infringement; and where a crime is constituted, criminal liabilities shall be investigated in accordance with the law.

Article 18 (Counterfeit term)

Where there is production, sale or dissemination of folk literary and artistic works, the administrative department for copyright under the State Council can implement administrative penalties based on article 17 of the Regulations.

Article 19 (Miscellaneous provision)

Publishers' rights, performer' rights, rights of producers of phonograms, rights for radio and television broadcasting as well as matters not regulated in the Regulation shall apply to relevant regulations of the Copyright Law of the People's Republic of China.

Article 20 (Cohesion policy)

Where use of folk literary and artistic works occurs before the Regulation enacted, relevant regulations and policies enforced at the time that the use occurred shall be applied.

Article 21 (Enforcement)

The Regulations enter into force on Date Month Year.

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